SUPREME COURT, U. S.

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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 824.

OWEN LYONS ET AL.,
Petitioners,
v.
JOHN F. X. DAVOREN, AS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States.

October Term, 1968.

No. 824.

OWEN LYONS et al.,
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v.
JOHN F. X. DAVOREN, as Secretary of the Commonwealth of Massachusetts, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinions Below.

The memorandum of the Federal District Court of Massachusetts, annexed as Appendix I at page 16 of the petition for writ of certiorari, is unreported. The opinion of the Court of Appeals for the First Circuit is printed as Appendix II at page 20 of the petition and is reported at F. 2d (1st Cir. 1968).

Jurisdiction.

The judgment of the Court of Appeals (Appendix III, at page 26 of the petition) was entered on October 25, 1968.

The petition for writ of certiorari was filed in this Court on December 9, 1968, under 28 U.S.C. § 1254(1).

Statutes.*

A. Statutes relative to the jurisdiction of the Court of Appeals:

28 U.S.C. § 1291.
28 U.S.C. § 1292.
28 U.S.C. § 2281.

B. Statutes relative to the petitioners' substantive contentions:

Massachusetts G.L. c. 53, § 6.
Massachusetts G.L. c. 53, § 44.
Massachusetts G.L. c. 53, § 48A.
Massachusetts G.L. c. 54, § 77.

Statement of the Case.

On August 5, 1968, the petitioners filed this action in the United States District Court for the District of Massachusetts. Although the complaint is, in the words of the District Court, "vague and not specific" (Memorandum, p. 17 of the Petition), it appears that the petitioners' contentions are focused on those Massachusetts statutes, G.L. c. 53, §§ 6 and 44, which govern Congressional nominations for independent and "party" candidates. The complaint contains prayers for declaratory relief and for the convening of a three-judge court.

*The text of the cited statutes may be found in the Appendix to this brief.

Although drawn loosely and without positive assertions, the complaint seems to say that the "equal protection" guarantees of the Fourteenth Amendment are denied to "independent" candidates for Congress by the Massachusetts statutes. Under those statutes a political-party candidate for Congress, in order to win a place on the ballot for the 1968 general election, was required *first* to either win his party nomination for the primary ballot at a party convention or, if he failed to win the nomination, obtain 2,000 signatures, and *second* to enter the primary election and then win it. An independent candidate for Congress from the Eighth District, on the other hand, was required to produce 4,373 signatures to attain printed status on the ballot for the 1968 general election (Petition, at page 21).

The District Court issued a "memorandum" on August 12, 1968 (Petition, p. 16), which ruled that the complaint "does not present a substantial federal question" and that "[f]or all the reasons hereinbefore set forth the prayer for convening the three-judge court is hereby denied." On August 30, 1968, the respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted. No disposition of that motion has yet been made.

An appeal from the District Court's action was filed with the Court of Appeals for the First Circuit on September 6, 1968. On October 25, 1968, the Court entered a judgment: "Appeal dismissed for lack of jurisdiction" (Petition, p. 26).

Question Presented.

Whether the Court of Appeals had jurisdiction of the appeal from the order of the Federal District Court judge refusing, for lack of a substantial federal question, to con-

vene a three-judge court to enjoin enforcement of the Massachusetts statute governing requirements for the nomination of independent Congressional candidates when the merits of the case, including the matter of declaratory relief, still remained for further consideration by the District Court judge?

Argument.

1. SINCE THE ORDER OF THE DISTRICT COURT WAS INTERLOCUTORY IN NATURE AND DEALT ONLY WITH THE CONVENING OF A THREE-JUDGE COURT, LEAVING FOR FURTHER DETERMINATION THE MERITS, INCLUDING DECLARATORY RELIEF, THE ORDER WAS NOT "FINAL," AND WAS THEREFORE NOT APPEALABLE TO THE COURT OF APPEALS.

28 U.S.C. § 1291, provides that only "final decisions" are reviewable by appeal to a Court of Appeals. The only exceptions are found in 28 U.S.C. § 1292, but they do not include a mere refusal to convene a three-judge panel under 28 U.S.C. § 2281. The exclusive remedy for such refusal lies rather in a petition to the Supreme Court for a writ of mandamus. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 16 (1930).

The memorandum of the District Court in the present case merely declined to convene a three-judge court. That the District Court judge was keenly aware that his action was only interlocutory is evident from his statement that "the immediate judicial action sought by plaintiffs is notice to the Chief Judge to establish a three-judge court;" from his ruling that the complaint "does not present a substantial federal question" (see *Ex Parte Poresky*, 290 U.S. 30); and from his conclusion that "For all the reasons hereinbefore set forth the prayer for convening the three-judge

court is hereby denied" (Petition, pp. 16-18). *Cf. Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715, note 2, wherein it was held that by the denial of the application for a three-judge court "[a]ppellant was effectively out of court" because the District Court judge indicated that he would abstain from further action in the case until state courts decided the questions in issue.

Neither the merits nor the prayer for declaratory relief was disposed of by the memorandum in the present case, each remaining for the District Court's further determination. *Stratton* v. *St. Louis Southwestern Railway Co., supra,* is therefore decisive of the case at bar. *Stratton* held that "no appeal lay to the Circuit Court of Appeals [from the refusal to convene a three-judge panel], and that court should have dismissed the appeal for want of jurisdiction." 282 U.S. at 16. The Court of Appeals in the present case strictly adhered to *Stratton's* mandate. To review the Court of Appeals' decision by a writ of certiorari now would serve no useful purpose. There is no suggestion that *Stratton* is not applicable, is not controlling authority, or that its force has in any way been diminished. We observe, moreover, that the jurisdiction of the Court of Appeals is fixed by statute. Since *Stratton* was decided in 1930, we must now certainly conclude that Congress has regarded the *Stratton* rule as embedded in the statute itself.

2. WHETHER OR NOT THE COURT OF APPEALS HAD JURISDICTION OF THE APPEAL FROM THE REFUSAL TO CONVENE A THREE-JUDGE COURT, THE MASSACHUSETTS NOMINATION REQUIREMENTS RELATIVE TO INDEPENDENT CANDIDATES FOR CONGRESS DO NOT VIOLATE "EQUAL PROTECTION" GUARANTEES.

Although the question before this Court relates exclusively to the correctness of the Court of Appeals' refusal

to take jurisdiction of the appeal, we note, in any event, that petitioners' substantive arguments are lacking in merit.

An examination of the challenged statutes reveals that they do not violate the Fourteenth Amendment's "Equal Protection" clause. As stated in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955), "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." This limitation on the Fourteenth Amendment's protective function was recognized in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), an election case, where the Court held:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 425-426.

The application of the foregoing test to the instant case shows strong justification for the Massachusetts classification.

Since political parties are an essential element of the American electoral process, a state may establish conditions which candidates of political parties must meet in order to gain recognition as party nominees. "Independent" candidates may also be required to meet certain conditions for ballot position. Because the latter candidates are necessarily determined by a process which is different from the process by which party candidates are named, a state may, we submit, provide different requirements for each process. And, as long as a state does not thereby deny the right to vote or impose unreasonable limitations on the right to seek public office, there is no valid reason for complaint.

In the present case the Massachusetts statutes not only do not discriminate against the independent candidate; they may actually be regarded as placing a lighter burden on him than on the party candidate. The "party" candidate, in order to enter the general election, must *first* win his party's nomination at the party convention (or, failing that, obtain 2,000 signatures) to get on the primary ballot, and *second* enter the primary and win it. If he fails at the primary and still desires to run in the general election, he must comply with the same requirements imposed on independents. G.L. c. 53, § 48A. By contrast, an independent candidate in the Eighth Congressional District is required to produce only 4,373 signatures to gain printed status on the November general ballot. (This figure is derived from the so-called "three per cent" rule of G.L. c. 53, § 6.) And any candidate may win the general election by write-ins alone. G.L. c. 54, § 77.

Having in mind the burdens placed on political-party candidates, we submit that the treatment of the independents is certainly not unfair. The November, 1968, election, moreover, is now history, and nothing in the case suggests that the facts present an issue of such vital importance as to invoke the attention of this Court. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), for the rule that this Court will not use certiorari to examine a matter of "scholarly" or "academic" interest only.

Conclusion.

For the foregoing reasons, the respondents urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Appendix.

A. Statutes Relative to the Jurisdiction of the Court of Appeals.

28 U.S.C. § 1291. Final decisions of District Courts:

"The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." (Emphasis supplied.)

28 U.S.C. § 1292. Interlocutory decisions:

"(a) The court of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 2281. Injunction against enforcement of State statute; three-judge court required:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

B. Statutes Relative to Petitioners' Substantive Contentions.

Massachusetts G. L. c. 53, § 6. Nomination papers; number of signatures:

"Nominations of candidates for any offices to be filled at a state election may be made by nonination papers, stating

the facts required by section eight and signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election in the commonwealth at large or in the electoral district or division for which the officers are to be elected. In the case of offices to be filled by all the voters in the commonwealth, no more than one third of the required number of signatures shall be from any one county. Nominations of candidates for offices to be filled at a city or town election, except where city charters or general or special laws provide otherwise, may be made by like nomination papers, signed in the aggregate by not less than such number of voters as will equal one per cent of the entire vote cast for governor at the preceding biennial state election in the electoral district or division for which the officers are to be elected, but in no event by less than twenty voters in the case of an office to be filled at a town election; provided, however, that no more than fifty signatures of voters shall be required on nomination papers for such town office. At a first election to be held in a newly established ward, the number of signatures of voters upon a nomination paper of a candidate who is to be voted for only in such ward shall be at least fifty." (Emphasis supplied.) (As amended through St. 1960, c. 224.)

Massachusetts G.L. c. 53, § 44. Nomination papers; number of signatures:

"The nomination of candidates for nomination at state primaries shall be by nomination papers or by endorsement for nominations by state convention as provided in section fifty-four. In the case of offices to be filled by all the voters of the commonwealth, nomination papers shall, except as hereinafter provided, be signed in the aggregate by at least ten thousand voters, not more than fifteen hundred of the

total number required to be from any one county; nomination papers in the case of a candidate for any such office who received at least twenty per cent of the vote on any ballot for nomination for such office at the state convention held immediately prior to the state primary shall be signed in the aggregate by at least twenty-five hundred voters, not more than five hundred of the total number required to be from any one county. *Such papers for all other offices to be filled at a state election shall be signed by a number of voters as follows:—for representative in congress, two thousand voters;* for councillor, district attorney, clerk of courts, register of probate and insolvency, register of deeds, county commissioner, sheriff and county treasurer, one thousand voters, except that in Barnstable, Berkshire, Franklin, and Hampshire counties such papers for nomination to the office of clerk of courts, register of probate and insolvency, register of deeds, county commissioner, sheriff and county treasurer shall be signed by five hundred voters; for state senator, three hundred voters; for representative in the general court and commissioners to apportion Suffolk county, one hundred and fifty voters; provided, however, that if ten per cent of the number of voters in the respective district who are enrolled in the party whose nomination the candidate seeks is a lesser number than the aggregate required above, then such ten per cent shall be the required aggregate. The total number of such enrolled voters shall be determined from the records in the office of the state secretary. In Dukes and Nantucket counties such papers for nomination to all offices within the county to be filled at any state election shall be signed by twenty-five voters." (Emphasis supplied.) (As amended through St. 1966, c. 335, § 1.)

Massachusetts G.L. c. 53, § 48A. Nomination otherwise than by political party; independent candidates:

"If a candidate for any office to be filled at a state election is nominated otherwise than by a political party, and files for the same office at the same election a certificate of nomination or nomination papers of either of the two major political parties, said party nomination papers or certificate of nomination shall be declared invalid and of no account, except as hereinafter provided.

"Any person who is a candidate for any office to be filled at a state election shall make a choice as to whether he intends to be a candidate for nomination of a major political party or as a state election candidate, generally referred to as an independent candidate, by the withdrawal of his name as a candidate for nomination of such party or as a candidate for state election, as the case may be, in the manner provided by section thirteen. If a person files as a state election or independent candidate, and likewise files nomination papers for nomination of either of the two major parties, and fails to make such choice of withdrawal, he shall not have his name printed on the ballot to be used in the state primary as a candidate of either of the two major political parties, or printed on the ballot to be used at state elections as a state election or independent candidate unless he was nominated at the primary by having his name inserted on the ballot, either by writing or by a paster or sticker, and accepted said nomination." (Added by St. 1956, c. 232.)

Massachusetts G.L. c. 54, § 77. Marking ballots:

"The voter on receiving his ballot shall, without leaving the enclosed space, retire alone to one of the marking compartments, and shall, except in the case of voting for presi-

dential electors, and except as provided in section thirty-three E, prepare his ballot by making a cross (X) in the square at the right of the name of each candidate for whom he intends to vote *or by inserting the name and residence of such candidate in the space provided therefor and making a cross in the square at the right;* and, upon a question submitted to the vote of the people, by making a cross in the square at the right of the answer which he intends to give." (Emphasis supplied.) (As amended by St. 1967, c. 564, § 11.)